

SIERRA CLUB AIR TOXICS CAMPAIGN

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Alan Mitchell

Minnesota Environmental Quality Board
Centennial Office Building – 3rd Floor
St. Paul, Minnesota 55155

RE: Possible Amendments to Minnesota Rules Parts 4410.7000 to 4410.7500
Special Rules for Certain Large Energy Facilities and High Voltage
Transmission Lines

Dear Mr. Mitchell:

The Sierra Club hereby submits comments on the proposed amendments to Environmental Quality Board rules governing environmental review of large electric power generating plants and high voltage transmission lines.

The Sierra Club is a national environmental organization with over 700,000 members and approximately 19,000 members who reside in Minnesota. Since June 2000, the Sierra Club has coordinated an Air Toxics Campaign in Minnesota to reduce air pollutants that affect human health and the natural environment, including emissions from fossil fuel power plants. The Sierra Club participated in the process that led to adoption of Energy Security Reliability Act of 2001, in recent rulemaking processes pertaining to siting and routing of power plants and power lines and in administrative hearings pertaining to Xcel Energy's efforts to site high voltage transmission lines in Southwestern Minnesota.

The Sierra Club appreciates the EQB's efforts to clarify the nature of environmental review in the certificate of need process. However the Sierra Club has serious concerns both about what is included in the text of the Proposed Rules and what has been left out of the proposed process to provide environmental review of power plants and power lines before the State determines that such facilities are needed.

The omissions from the Proposed Rules are fundamental to the process of environmental review:

- 1) The Proposed Rules define no responsibility on the part of the Environmental Quality Board to exercise independent professional judgment, evaluate information or make recommendations based on environmental factors.
- 2) The Proposed Rules set no standard by which the Environmental Quality Board would make such a recommendation to the Public Utilities Commission and do not

incorporate by reference the standards for environmental decision-making which are already in Minnesota law.

- 3) The Proposed Rules fail to require that applicants disclose sites and routes under consideration, fail to provide landowners near such proposed sites with any meaningful notice, and provide no framework for the joint hearing on need and siting issues, which was requested by numerous stakeholders in the meeting convened by the Environmental Quality Board in August to discuss these Proposed Rules.
- 4) The Proposed Rules fail to explicitly require that, where a joint hearing on need and siting isn't held, every issue which will be deemed to be foreclosed during siting review must be explicitly evaluated during environmental review at the certificate of need stage.

The text of the Proposed Rules also raises concerns about the efficacy of the contemplated environmental review and the role which members of the public will be allowed to play in this process.

- 1) The text uses language which suggests that the environmental review will be limited to a compilation of information, which information need not be validated by the applicant, need not be specific to the project and need not be complete. This is an inappropriate limitation upon environmental review.
- 2) The proposed text places an unreasonable burden on members of the public who might suggest alternatives and precludes the public from participating in environmental review in any meaningful way after an initial public meeting.
- 3) The text does not require that critical alternatives be analyzed as part of the environmental review process. The text also fails to include many of the known impacts of large electric power generating plants and high voltage transmission lines.

The Sierra Club first discusses critical omissions from the Proposed Rules.

OMISSIONS FROM PROPOSED RULES

1. Exercise of Independent Judgment

The Proposed Rules define no specific responsibility on the part of the EQB other than “describing” or “discussing” various types of information pertaining to environmental impacts and “addressing” various issues identified as common to power plants and high voltage transmission lines. The only area which the Proposed Rules suggest must be analyzed is the feasibility of alternatives. See Proposed Rules 4410.7635.

Under Minnesota case law, environmental review must entail application of independent professional expertise to evaluate environmental impact decisions. As the Minnesota Supreme Court held in No Power Line v. Minnesota Environmental Quality Council, 262 N.W. 2d 312, 327 (Minn. 1977),

The purpose of all environmental legislation, at both the state and the federal levels, is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions. The agency's role . . . is to be a source of independent expertise whose scientific investigation can

uncover the data necessary to make an informed environmental decision. This theme was stressed in Greene County Planning Board v. Federal Power Comm., *supra* (455 F.2d 420).

“The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as umpire. The danger of this procedure, and one obvious shortcoming is the potential, if not likelihood, that the applicant’s statement will be based upon self-serving assumptions.”

This policy was recently reiterated in Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W. 2d 874, 880 (Minn. App. 1995); “MEPA’s purpose is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decision.” Federal courts have similarly interpreted the Minnesota Environmental Policy Act in Cedar-Riverside Environmental Defense Fund v. Hills, 422 F. Supp. 294, 326-327 (1976) *rev’d on other grounds*, 560 F. 2d 377 (8th Cir. 1977) to require that a state agency must independently evaluate alternatives in terms of their environmental benefits, costs and risks. Serving as a conduit for factual information was held to be insufficient under the Minnesota Environmental Policy Act.

The Sierra Club suggests that the role of the Environmental Quality Board should be clearly stated in these Rules. The EQB should independently evaluate environmental impacts and benefits of the proposed project and alternatives and make a recommendation to the Public Utilities Commission based on this analysis. The PUC would then take this recommendation, among other factors, into consideration in determining whether or not to issue a certificate of need. This clarification would provide meaning to the text of Proposed Rule 4410.7660, Subpart 1, providing that the PUC decision shall not be made until environmental review is completed.

2. Standard for Environmental Review

Just as the Proposed Rules fail to specify the role of the EQB in analyzing environmental information and making a reasoned recommendation, the Rules also fail to set a standard with which environmental review should comply. The Sierra Club suggests that there is no need to create a new standard; the Proposed Rules should simply state that the EQB will make a recommendation to the PUC based on the analysis of environmental information, consistent with the Minnesota Environmental Policy Act, Minn. Stat. §116D.04, Subd. 6.

Application of this standard for the EQB’s recommendation to the PUC is founded on Minnesota case law. Minnesota courts have consistently construed legislation pertaining to power plant and power line siting and routing to harmonize with, rather than supersede the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act. As the Minnesota Supreme Court stated in People for Environmental Enlightenment and Responsibility v. Minnesota Environmental Quality Council, 266 N.W. 2d 858, 865 (Minn. 1978)

Although the focus of each of these statutes is slightly different, together they are part of a coherent legislative policy, one whose aims are to harmonize the need for electric power with the equally important goal of environmental protection. .

Rather than intending the PPSA [Power Plant Siting Act] to supersede MERA [Minnesota Environmental Rights Act], the legislature passed all these statutes to ensure that administrative agencies would discharge fully their environmental responsibilities.

By explicitly defining the EQB's independent role and requiring its recommendations to comply with standards in MEPA, Chapter 4410 Rules could ensure that both the EQB and the PUC would fully discharge their environmental responsibilities, so that decisions would not be vulnerable to challenge.

3. Joint Hearing on Need and Siting or Routing

The Sierra Club was surprised to discover that the Proposed Rules contain no provision for a joint hearing on need and siting or routing of proposed projects.

The concept of a joint hearing process was discussed at some length in the meeting convened by the Environmental Quality Board on August 28, 2002 regarding the Proposed Rules. At that meeting, Minnesota Pollution Control Agency staff, the Sierra Club, the Minnesota Center for Environmental Advocacy and several citizens' representatives supported a proposal to encourage joint hearings whenever possible.

Various stakeholders pointed out that, absent a joint hearing on these issues, it is quite likely that the landowners most directly impacted by a project would not learn of it until after critical issues pertaining to the size, type, timing, voltage and configuration of the project were already determined. This denial of rights to participate in any public process until it is too late to influence decision-making is particularly galling since, in many cases, sites and routes under consideration are known by the time when an application for a certificate of need is filed.

Staff from the Department of Commerce suggested that more specific information on proposed sites and routes would assist regulators in their efforts to improve notice to members of the public. It was also suggested that there might be greater efficiency and certainty in having one environmental review process, rather than two separate environmental analyses, one for certificate of need and a second for siting and routing.

Although a representative for transmission owners spoke against this proposal, at least one utility representative said he would be receptive to a joint hearing and a single, unified determination of environmental issues.

The Sierra Club recommends that the Proposed Rules be substantially revised to require that an applicant disclose sites and routes under consideration for proposed projects and to create disincentives that discourage applicants from concealing information about proposed sites and routes of facilities.

The Sierra Club recommends that information about proposed sites and routes under consideration should be used to develop a notification process which permits local property owners and officials to participate meaningfully in the evaluation of alternatives during the certificate of need process. The Proposed Rules should specify the nature of the notice that is to be provided, so that members of the public know that this is their only opportunity to raise concerns about the size, type, voltage, configuration and timing of the proposed project; how they may participate in the environmental review and certificate of need process; that they may suggest alternatives to the proposed project; how to obtain a copy of the application prior to the public meeting; what specific sites or

routes are being considered by the applicant, and other information necessary to participate meaningfully in the process of environmental review for certificate of need. The recently drafted Rules for pertaining to siting and routing of power plants and transmission lines in Minn. Rules 4400.1350 should provide guidance as to the nature of notice that could be effective.

The Sierra Club, finally, recommends that the Proposed Rules describe a joint hearing process that could be used to determine environmental issues for need, and for siting or routing in a single proceeding. The Proposed Rules should be written to favor the conduct of joint hearings.

4. Environmental Review of Issues Precluded from Later Consideration

Throughout the discussion of the Chapter 4400 rulemaking, both stakeholders and EQB staff asserted that any issues excluded from EQB siting and routing review must be analyzed in the environmental review process at the certificate of need stage, consistent with recently-enacted Minnesota State law. However, despite the State's interest in assuring that this analysis takes place, the Proposed Rules establish no such requirement.

Applicable law states that the no-build alternative shall not be considered by the EQB after a certificate of need has been issued (Minn. Stat. §116C.57) and that questions of need, including size, type, and timing; alternative system configurations; and voltage are not within the board's siting and routing authority after a certificate of need has been issued. (Minn. Stat. § 116C.52)

The most obvious requirement of the Chapter 4410 Rules is to assure that these issues be analyzed fully and independently in the environmental review process prior to issuing a certificate of need.

The Sierra Club recommends that the Proposed Rules explicitly mandate analysis and that recommendations be made by the EQB to the PUC on any issue which is excluded from later consideration, including the no-build alternative and alternatives of size, type, timing, alternative system configuration and voltage.

Related to these issues, the Sierra Club would also raise concerns about various sections of the Proposed Rules. Our comments on specific sections of text are stated below.

COMMENTS ON PROPOSED TEXT

Comment to Proposed Rule 4410.4400

This section refers to "Mandatory EIS Categories." Under the Proposed Rules, this appears to be a misnomer. The section should define "Mandatory Categories for EQB Environmental Review."

In the preceding section pertaining to mandatory EAW categories, current Rules provide that the EQB shall be the "responsible governmental unit." The Proposed Rules should, correspondingly, designate the responsibilities of the EQB to make an independent recommendation in the environmental review process.

Comment to Proposed Rule 4410.7610, Subp. 3

The environmental review document required under these Rules should not be referred to as an Environmental Assessment. Minnesota and Federal laws including the Minnesota Environmental Protection Act ("MEPA") and the National Environmental Protection Act

(“NEPA”) already use the terms “Environmental Assessment Worksheet” and “Environmental Assessment” respectively to refer to a preliminary screening document used to determine whether a project warrants environmental review. (See Minn. Stat. §116D.04, Subd. 2a; 40 C.F.R. §1501.4) For this reason, the term “assessment” appears peculiarly unsuited to a document that will reflect the environmental review itself.

The Sierra Club recommends that the document required in the Proposed Rules be identified with a unique name, such as “Environmental Review Document” or “Environmental Review for Certificate of Need.” This change in terminology should be reflected throughout the Proposed Rules.

The Sierra Club also suggests that the definition of the document state that the document “analyzes” or “evaluates” human and environmental impacts and alternatives, rather than “describes” them. “Describing” a set of potential harms or alternatives implies that the Environmental Quality Board will exercise no professional judgment, but will merely aggregate information.

Comment to Proposed Rule 4410. 7620

This section appears to make the Environmental Quality Board responsible for the accuracy of the information submitted by the applicant, without making the EQB responsible for the exercise of independent judgment in evaluating the significance of the information. This seems topsy turvy. The applicant should be responsible for the completeness and accuracy of all information it supplies and for its timely update, rather than placing this burden on a government agency. The EQB, however, should be responsible to obtain additional information on environmental impacts, as needed, and to conduct an independent evaluation.

Related to this point, the Sierra Club believes that the EQB should specify what information the applicant should supply for environmental review pertaining to a request for certification. Even if the EQB has concluded that the information currently required of an applicant under Public Utilities Commission Rules is adequate for environmental review, Rules and requirements of another agency are subject to change.

Comment to Proposed Rule 4410.7630, Subpart 1

This subpart provides no effective notice to the persons likely to be most effected by the construction of a large electric power generating plant or a high voltage transmission line. There is no requirement that property owners, local officials or community-based organizations located near the proposed site or route of a facility receive any form of notice, even if the applicant has selected a likely site or route for the proposed facility.

These Proposed Rules should require the applicant to identify all sites or routes that are being actively considered for the location of its facility. Notice should be provided to property owners, local government officials and community-based organizations to the extent that information is available regarding their scope and interest. As in the draft Minn. Rules 4400.1350, the content of notice should be specified so that notice provides members with the public with sufficient information to understand their interests and participate in the process.

Comment to Proposed Rule 4410.7630, Subparts 4 and 5

The Proposed Rules create an undue burden upon citizens and inappropriate constraints on the consideration of alternatives, which is the primary purpose of the environmental review. It is unreasonable to expect that members of the public should come to a meeting,

perhaps as little as ten days after they first learn of a project, prepared to provide a briefing on every alternative they would request be considered and the information that supports such consideration.

Minnesota law already provides some guidance for when alternatives should be considered and when they should be excluded from analysis. Minn. Rules 4410.2300, Subpart G. The Proposed Rules should presume that requested alternatives would be included unless they do not meet the purposes of the project, have no significant environmental benefit as compared to the project or alternatives already under consideration or provide similar environmental benefits as compared to another alternative, but at substantially higher costs.

The Proposed Rules also unreasonably constrain the participation of members of the public to participate in environmental review. Citizens have no opportunity to appeal the decision of the EQB chair with respect to scoping, no matter how the chair chooses to limit consideration of alternatives or impacts. There is also no opportunity for any member of the public to comment prior to the final completion of the environmental review document.

This process, thus, while it creates an appearance of public involvement, effectively prevents citizens from having any meaningful role in environmental review. The Sierra Club recommends that this section of the Proposed Rules be reconsidered to assure that members of the community play more than a token part in the environmental review process.

The Sierra Club also recommends that any member of the public who participates in the environmental review process should be entitled to participate in any subsequent hearings or proceedings at the PUC pertaining to the proposed project.

Comment to Proposed Rule 4410.7635

It is strongly recommended that the contents of the environmental review document for certificate of need be more carefully tailored to the objective of this environmental review. As suggested previously, the environmental document should contain analysis by the EQB of the environmental impacts and benefits of the proposed project and alternatives and a recommendation to the PUC based on that analysis.

Second, the terms “generic” and “general” should be removed from this section of the Proposed Rules. These terms create the impression that the quality of information to be used for environmental review need neither be specific, current nor attested to by the applicant. These terms seem to assure that the quality of review will be limited and subject to challenge. Although the Sierra Club doesn’t object to the use of information about the impacts and benefits based on the type of project or alternative proposed, this information should only be included if it is current, accurate, reflects the most up-to-date scientific information and is as carefully tailored to the specific project under consideration as is possible given available information.

The Sierra Club would question why radiation and radioactive wastes are not mentioned as potential impacts of power plants in Subpart 2. The Sierra Club would also question why noise impacts, visual impacts and impacts on land uses, such as agricultural, wilderness or park lands are not considered among the impacts of high voltage transmission lines in Subpart 3.

As mentioned before, analysis of alternatives pertaining to size, type, timing, voltage and system configuration as well as the no-build alternative should be specifically required in this section.

In addition, environmental review should specifically require evaluation of renewable energy alternatives, consistent with certificate of need statutes that preclude certification of a nonrenewable energy source without full consideration of renewable energy. Minn. Stat. §216B.243, Subd. 3a. The current language in Subpart 1B that refers to facilities using a “different” energy source should specifically state that in all cases this should include renewable energy source alternatives. If a transmission line is proposed, environmental review of alternatives should include “distributed generation” and “other energy storage and transfer, such as hydrogen extraction.” The term “generation,” by itself does not suggest a meaningful alternative to transmission lines.

CONCLUSION

The Sierra Club recommends that the Proposed Rules be redrafted to establish the clear responsibility of the EQB to analyze the environmental impact of power plant and power line alternatives and to make a recommendation to the PUC based on the standards of the Minnesota Environmental Policy Act. The Proposed Rules should also assure meaningful public participation, favor the joint consideration of need and siting and routing decisions and ensure that any alternatives which will be precluded from consideration in the siting or routing process are analyzed prior to a certificate of need decision.

The specific text of the Proposed Rules should validate that this process is one of environmental review, not a screening assessment and specify the respective responsibilities of the applicant and the EQB. Members of the public should be given more than a token role in the process and a full range of alternatives and impacts should be analyzed.

The Sierra Club appreciates the opportunity to comment and would welcome the opportunity to work with the Environmental Quality Board to ensure that the environmental review process at the certificate of need stage permits meaningful public participation and an effective analysis of alternatives.

Respectfully submitted,

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